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Supreme Court U.S.
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JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, . . . *Petitioner,*

vs.

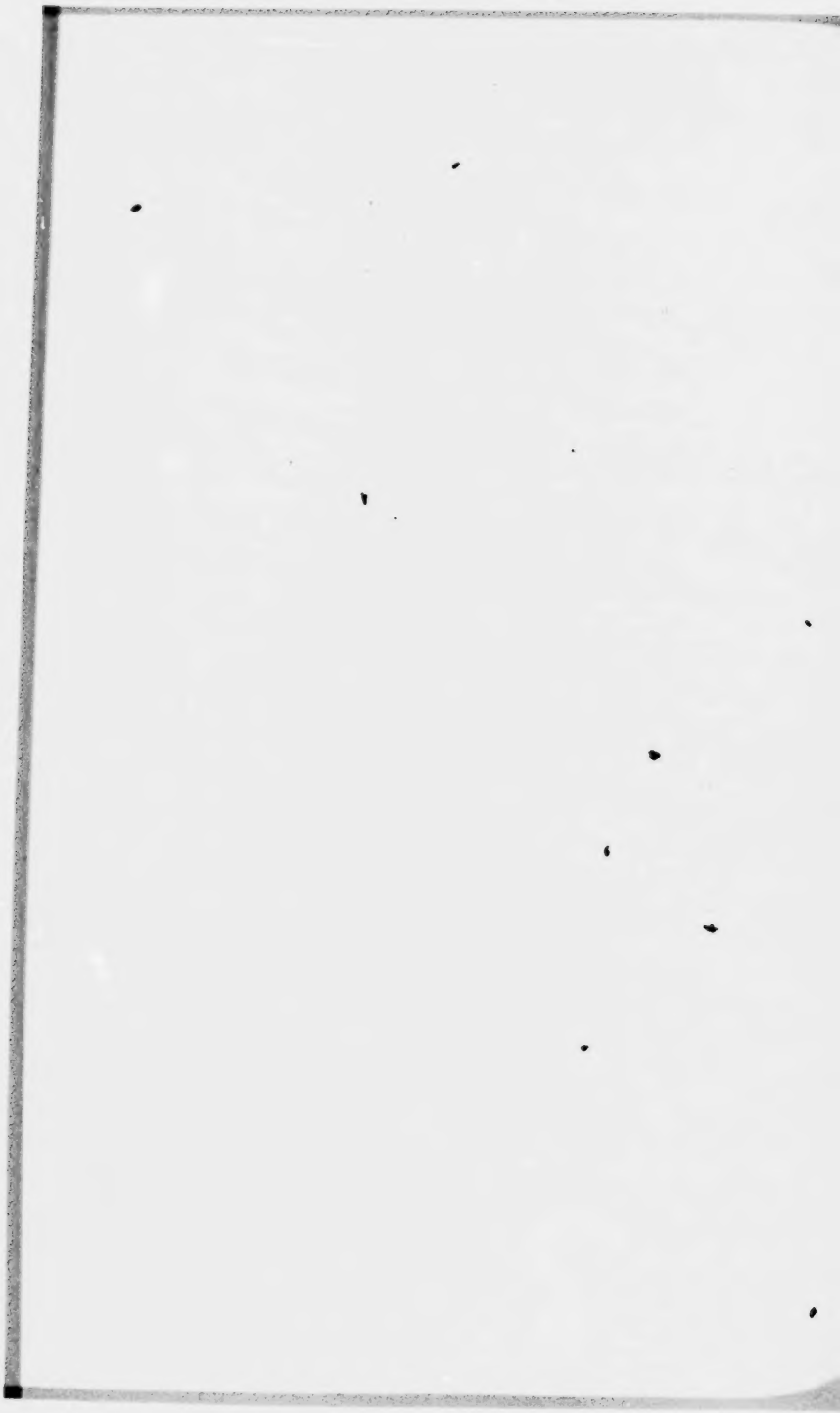
WILLIAM T. NUGENT, ... *Respondent.*

Motion, Petition for Writ of Certiorari, and Brief for the Petitioner, Arthur E. Mueller, Trustee in Bankruptcy of Edward B. Nugent, Bankrupt, in Bankruptcy.

WILLIAM W. WATTS,
Counsel for Arthur E. Mueller, Trustee.

JOHN RICHARD WATTS,
Of Counsel.

C. C. RUNKEMACHER PRESS, LOUISVILLE, KY.



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In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT . . . *Petitioner*,

VS.

WILLIAM T. NUGENT . . . . . *Respondent.*

MOTION.

Now comes Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, bankrupt, by William W. Watts and John Richard Watts, his counsel, and moves this Honorable Court that it shall, by a writ of *certiorari* directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein William T. Nugent was petitioner for review in the matter of Wayne Knitting Mills, Belding Bros. & Co. and the German Insurance Bank against Edward B. Nugent, bankrupt, in bankruptcy; and to that end now tenders his petition, together with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

WILLIAM W. WATTS,
JOHN RICHARD WATTS,
Counsel for Arthur E. Mueller, Trustee in Bankruptcy of Edward B. Nugent, Bankrupt.

Notice of date of motion is hereby waived; and notice of the foregoing motion is hereby accepted this 29th day of January, A. D. 1901.

WILLIAM T. NUGENT,
By W. M. SMITH,
Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT . . . *Petitioner*,

vs.

WILLIAM T. NUGENT . . . . . *Respondent.*

PETITION FOR WRIT OF CERTIORARI, TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, REQUIRING IT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVISION AND DETERMINATION, THE PETITION FOR REVIEW IN BANKRUPTCY TAKEN BY SAID W. T. NUGENT AGAINST ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, IN THE MATTER OF WAYNE KNITTING MILLS, BELDING BROS. & CO. AND THE GERMAN INSURANCE BANK VS. EDWARD B. NUGENT, BANKRUPT, IN BANKRUPTCY, LATELY DEPENDING IN SAID COURT OF APPEALS.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, bankrupt, filed under the provisions of Section 25*d* of the Bankruptcy Act of 1898, respectfully represents as follows:

I.

This cause involves a question entirely novel and one of the most vital importance arising under the Act of 1898—a question more far-reaching in its importance than the one

decided by this Court in Bardes vs. Bank, 178 U. S., page 524. Upon its determination by this Court depends to a large extent the usefulness of said Act.

On February 19, 1900, about the hour of 2 o'clock p. m., being more than three hours before a petition, praying for the involuntary adjudication of Edward B. Nugent, bankrupt, was filed, the respondent, W. T. Nugent, son of the bankrupt, received from the bankrupt (Edward B. Nugent), as his agent and as custodian of the fund, money belonging to the bankrupt amounting to $14,233.95. It is nowhere claimed by the one side or relied upon by the other in this controversy that the delivery of said fund to the agent as custodian was a "transfer" or "fraudulent transfer" within the meaning of the case of Bardes vs. Bank, 178 U. S., 524.

After the adjudication, certain proceedings in contempt were had against Edward B. Nugent, the bankrupt, looking to the recovery of that fund, but because of the then condition of mind of said bankrupt he was discharged from further attendance about that matter. Upon the petition of the trustee, the referee, to whom the case had been referred, then issued a rule against said W. T. Nugent to show cause, five days after service thereof, why he should not be required to turn over said funds to the trustee. (R., p. 19.) After some months' delay, said W. T. Nugent, having been served with a copy of said order, appeared before the referee in person and by counsel, and without objecting to the time given for response, or that he was improperly or irregularly made a party, filed a response (R., p. 23) to the rule in which he objected only to the jurisdiction of the referee or the Court to issue said rule; and further responded that if he had received the said money, or any part thereof, it was before the petition in bankruptcy was filed. He also responded that by reason of the fact that he was indicted, charged with the offense of receiving said money and retaining the same and aiding and abetting in the retention thereof, after the

filing of the petition in bankruptcy, he could not make further response without incriminating himself. Without waiving, but reserving, the jurisdictional question, Nugent then agreed that certain depositions of his father the bankrupt, his sisters and others should be read on the hearing of the response. (R., p. 21.) Nugent offered no proof in his own behalf.

The referee, in order to first determine whether he had jurisdiction, then heard the proof offered by the trustee and found that said Nugent had received said money only as agent and custodian of his father, the bankrupt; that he had not accounted for the same, and that said money belonged at the time of the hearing of the rule to the bankrupt's estate. No additional response was then offered by Nugent. Whereupon the referee then exercised jurisdiction and made said rule absolute and ordered Nugent to pay over the money to the trustee in bankruptcy. (R., p. 21.) Upon his failure to comply with said order, and still without additional response, the referee found him guilty of contempt and certified the case to the Judge, with a recommendation that said W. T. Nugent be punished for contempt and committed until he should pay said sum. (R., p. 25.)

The respondent then filed with the referee his petition for review, in pursuance of General Order No. 27 of the Supreme Court (R., p. 26), and upon the certification by the referee to the Judge, showing the question presented, the summary of the evidence, and the findings and order thereon, according to said General Order 27, and form 56, a hearing was had before him. The referee also certified to the Judge the depositions read on the hearing of the case, and same were before the Judge.

The Judge, after the hearing, rendered an opinion (R., p. 28) in which the finding of the referee was sustained, and said W. T. Nugent, being in Court, he was called to the bar to receive sentence; whereupon, at the request of said W. T.

Nugent by his counsel, the Judge deferred passing sentence for two days. At the expiration of said two days said respondent, by his counsel, tendered an amended response (R., p. 37) in which for the first time he sought to answer, in general terms, and with conclusions of law only, that the funds in question were held and claimed by him adversely to the bankrupt or his estate. The Judge, on the theory that the hearing was in the nature of an appeal from the decision of the referee, refused to permit that response to be filed, holding that it manifestly came too late (R., p. 36); that such response should have been filed before the referee at the time of the hearing upon the rule. That amended response so offered was neither filed generally nor for the purposes of appeal or review. In his opinion filed, the Judge, in addition to sustaining the findings of fact by the referee above recited, also found from the proof before him the following facts in this language:

> "The Court finds the facts of the case to be as above stated, with the addition that the entire amount, $14,233.95, is the property of the bankrupt's estate alone; that it had been taken possession of, and was held by W. T. Nugent as the agent only of his father up to and at the time of the adjudication, and that the respondent never claimed title to any part of it, nor made any claim or right to it by reason of any attempted transfer of title or ownership therein to him at any time, either in fraud of the bankrupt's creditors or otherwise, nor has he ever claimed to have converted any part of it to his own use, nor in anywise to have claimed it adversely to the bankrupt or the trustee." (R., pp. 30–31.)

In refusing to permit said amended response to be filed, the Court entered the following order:

> "Came William T. Nugent, respondent herein, and tendered an amended response and moved to file same,

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and the Court not having postponed the imposing of the sentence for that purpose, and being of the opinion that it is not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the Court, declines at this stage of the proceedings to permit a further response to be filed.

"And thereupon, pursuant to the opinion of the Court filed herein on the 1st instant, it is the judgment of the Court that Wllliam T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson County, Kentucky, until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of $14,233.95, or otherwise satisfy the said trustee with respect thereto; and the Court reserves the right and power to suspend or set aside this judgment and sentence upon the delivery, payment or satisfaction aforesaid.

"To all of which the respondent, William T. Nugent, excepts." (R., p. 36.)

Thereafter said W. T. Nugent, under Section 24*b* of the Act, filed a petition in the United States Circuit Court of Appeals for review, praying that the orders, judgment and sentence of the District Court be reviewed and revised in the matter of law, etc. (R., p. 1.)

After hearing said petition for review, said Circuit Court of Appeals, on the 13th day of December, 1900, entered a decree (R., p. 53) reversing and vacating the order of the District Court for the commitment of the respondent, and the order made by the referee upon the respondent to show cause, and the further order of the referee adjudging that said respondent be required to pay to the trustee the monies alleged to be under his control, as well as the order of the referee adjudging the respondent to be in contempt; and on the same day filed a memorandum opinion (R., p. 54) and issued its forthwith mandate (R., p. 53) in direct contravention of its Rules of Court No. 29 and 32, which are as follows:

29. "A petition for rehearing after judgment can be presented only within thirty days after the day when the

printed opinion of the Court is returned by the printer to the Clerk, and can be obtained by counsel for the parties (which date the Clerk shall note upon the appearance docket), unless by special leave granted during such thirty days, and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel, and will not be granted or permitted to be argued, unless a Judge who concurred in the judgment desires it and a majority of the Court so determine."

32. "In all cases finally determined in this Court a mandate or other proper process in the nature of a *procedendo* shall be issued, on the order of this Court, to the Court below, for the purpose of informing such Court of the proceedings in this Court, so that further proceedings may be had in such Court as to law and justice may appertain.

"Such mandate shall not issue until time has elapsed for filing a petition to rehear, as defined by rule 29; and no mandate or other process or *procedendo* shall issue when a petition to rehear is pending, unless specially ordered.

"Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case."

By that action W. T. Nugent was immediately released from custody, and that before this petitioner could apply for a rehearing in that Court or *certiorari* here.

On the 17th day of January, 1901, said Circuit Court of Appeals filed a printed opinion in the cause. (R., p. 56.)

II.

With the petition for review said W. T. Nugent filed various exhibits containing matters not part of the record in the Court below, one of which was a copy of said amended response (R., p. 37), which was not a part of the record or

before the referee or Judge below, as shown herein above. And said petition for review further contained allegations of fact not in or shown by the record, and not before the District Court or the referee.

Among other things said petition for review contained the following allegations, to-wit:

> "He says that he had converted all of said money of E. B. Nugent which came into his hands to his own use, he being a creditor of said Nugent, and to the paying of the other debts of E. B. Nugent before the filing of said petition in bankruptcy or the appointment of said trustee or the adjudication therein, and that there was no evidence to the contrary, or that he had any of said money on hand or under his control when he was served herein as stated." (R., p. 6, beginning on 25th line.)

As stated, that allegation was never before the referee or the Judge of the District Court, nor was it acted upon by them, but was wholly original matter, and not properly a part of the record. All the irrelevant and impertinent matter the trustee moved the Circuit Court of Appeals to expunge from the record, which motion said Court of Appeals failed to sustain or act upon; though it is contended, as appears from the opinion of that Court, many of those impertinent matters, and particularly said so-called amended response, were relied upon.

III.

The Supreme Court, in Bardes vs. Bank, 178 U. S., 524, has decided that, except with the consent of the proposed defendant, the District Court has no jurisdiction to entertain an independent suit brought by a trustee in bankruptcy to set aside a fraudulent transfer made by the bankrupt to a third party, in possession of and *claiming the property* "*as*

his own," and which transfer is *alleged to have been fraudulent as against creditors.* Except as to suing a debtor, that is all that said case does decide.

But, upon authority of that decision, the Circuit Court of Appeals has held that the District Court, which included the referee, has no jurisdiction, by summary process or rule, to compel a mere custodian of the property of a bankrupt to deliver the same to a trustee in bankruptcy when the elements of a fraudulent transfer did not exist, nor were alleged; and that, too, even though it be conceded that the legal title of said property was in the bankrupt and is vested by the Bankrupt Act in the trustee; and, too, when the custodian is asserting no adverse title to the property; and, further, the Court of Appeals has decided that where a party makes a general assignment for the benefit of creditors, and by reason thereof is adjudged a bankrupt, the trustee in bankruptcy can not recover the property of the bankrupt from the assignee by summary process, notwithstanding the deed of assignment is made void by the adjudication in bankruptcy; but he must resort to an independent action unless there be jurisdiction upon other grounds than those arising under the bankruptcy law.

And the Court of Appeals has in effect held that the referee may not by summary procedure inquire into the nature of the custodian's holding, to ascertain if it be adverse or not; and it has further held that, though the custodian fails to assert any adverse claim, and the proof shows his holding to be amicable, the referee is nevertheless without jurisdiction to compel him to surrender the property to the trustee. These rulings it is contended are not warranted by Bardes vs Bank, *supra.*

It is to review the rulings of the Circuit Court of Appeals on these questions that this petition for a writ of *certiorari* is applied for. The questions are of paramount importance, because, unless that decision of the Court of Appeals is re-

versed or materially modified, the power of the bankruptcy court under Section 2 (6), (7) and (13) of the Act to bring in and substitute additional persons or parties in proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy, to cause the estate of bankrupts to be collected, reduced to money and distributed, to determine controversies in relation thereto, and to enforce obedience by bankrupts and other persons, will be almost, if not entirely, rendered nugatory.

The question in this case is not as it was in Bardes' case, whether the District Court has jurisdiction to entertain a plenary and independent suit, brought by a trustee in bankruptcy against a citizen of the same State to recover assets, the title to which is in dispute; but the question involved is this: Can the District Court by rule compel an agent or custodian for the bankrupt or for the Court, who has the mere naked possession of the bankrupt's estate, claiming no interest therein, and asserting no title thereto, to deliver such property to the trustee? Or must the trustee be compelled to resort to an ordinary action and the expense and delays incident thereto in another court to obtain possession of such property from such a custodian? Or does not the bankruptcy law provide means for the speedy and economical administration of the estate, and does not Section 2 with its sub-sections exactly cover just such cases as this?

Your petitioner, with all due respect, maintains that the case of Bardes vs. Bank, *supra*, is not susceptible of the constructions placed upon it by the Court of Appeals, and was evidently not so intended by this Court; and therefore under that authority, the Court of Appeals erred when it held, as it did in effect, that under no circumstances can the possession of property be recovered, except by an independent, plenary, dilatory and expensive suit in some other court.

Your petitioner contends that, on the contrary, the District Court has jurisdiction by summary process to require the

custodian of property belonging to the bankrupt's estate, to deliver the same to the trustee, unless said custodian is holding the property adversely or claiming, in good faith, title, or at least colorable title, to said property; that the custodian is the agent or trustee of the court holding such property, and can by a rule be compelled to deliver it over to the trustee; that the mere naked possession of property without claim of title or color of title, is not sufficient to put the case at bar within the principles of the Bardes case. In fact, this Court, in stating the question decided in the Bardes case, laid stress upon the point that the third party, from whom it was sought to recover the property, was holding it adversely; and that adverse holding was the foundation upon which this Court based that opinion.

After diligent search petitioner has been unable to find any definition of "adverse possession" which does not contemplate the holding by some claim or color of title.

The petition for review filed in the Court of Appeals gave that Court only the power to review matters of law. (*In re* Purvine, 5th Circuit Court of Appeals, 96 Fed., 192.) And the Circuit Court of Appeals in this circuit has so declared in Cunningham vs. German Insurance Bank, 103 Fed., 932, and has further decided that only such matters as were acted upon by the Court below could be reviewed.

So that upon the record, disregarding the impertinent matter as it reached the District Court and Circuit Court of Appeals, it was conclusively established, as matter of fact, that W. T. Nugent received said funds only as the agent or custodian of the bankrupt; that at no time until after the rendition of the opinion by the District Judge was he asserting any claim or right to or ownership in said fund; consequently the cold question of law was before the Court of Appeals as to whether or not the referee or the District Court had power by rule to compel such a custodian, claiming no title in the property, to deliver it to the trustee.

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IV.

This Court, in the case of White vs. Schloerb, 178 U. S., 542, decided that a judge of the bankruptcy court may compel a sheriff to return goods to the judicial custody of his court, seized and taken therefrom by a sheriff in replevin proceedings.

The petitioner contends that in the case at bar, the agent's custody, being amicable and without adverse claim, placed the agent in the attitude of the sheriff in the White vs. Schloerb case; and there being no adverse claim at the time of the adjudication, trial and decision by the referee and Judge, the property could not be lifted from the judicial custody by any adverse claim thereafter made.

Nugent's taking or holding the money as custodian was continuous from the moment he received it until he was ordered to pay it over; and it was at all times a holding for the benefit of the bankrupt, and hence for the Court and its officer, the trustee. There never was a break in that continuity.

In the case of *in re* Rosser, 101 Fed., 562, the Eighth Circuit Court of Appeals has held that upon adjudication all the property of the bankrupt is placed in *custodia legis*, and that the bankrupt and every other party who has the possession or control of any part of it, holds that part as agent and trustee of the court and its officer.

The Circuit Court of Appeals for the Ninth Circuit, *in re* Francis-Valentine Co., 94 Fed., 793, has decided that the Court may summarily require a sheriff to deliver to the trustee the possession of a bankrupt's property seized within four months prior to the proceedings in bankruptcy; and in that case the Court, commenting on Marshall vs. Knox, 16 Wall., 551, used this language:

"In that case a lessor of the bankrupt had caused the sheriff, under a writ of provisional seizure, to take possession of certain property of the bankrupt, which the lessor claimed the right to hold as a pledge for the payment of rent which was due him. It was held that the District Court sitting in bankruptcy has no jurisdiction to proceed by rule to take the goods from the possession of the sheriff. The Court, referring to the seizure of the goods, said: 'The landlord claimed the right thus to hold possession of them until his rent was satisfied. This claim was adverse to that of the assignee.' These words quoted from the opinion fully explain the ground of the decision. It was because the claim was adverse to that of the assignee. In the present case the sheriff had possession, not in opposition to the right of the bankrupt nor in antagonism to its title, but his possession was based entirely upon the assumption that the title was in the bankrupt."

The Court will observe that the analogy between the Valentine case and the case at bar is complete, for it is established by facts binding upon the Court of Appeals that W. T. Nugent received this money as custodian only; that the capacity of custodian was never changed, and that he was asserting no adverse claim or title thereto; but, in the words of the Court of Appeals for the Ninth Circuit, Nugent "had possession, not in opposition to the right of the bankrupt, nor in opposition to his title, but his possession was based entirely upon the assumption that the title was in the bankrupt." The District Courts in Vermont, New York and West Virginia, which decisions are the law in those districts respectively, have also sustained the right to issue such rules. (*In re* Brooks, 91 Fed., 518; *in re* Raymond W. Kenney, 95 Fed., 427; *in re* Moore, 104 Fed., 869.) Then, too, it is contended the opinion of the Court of Appeals is in conflict with White vs. Schloerb, 178 U. S., 542.

In re Ward, 104 Fed., 985, it was sought to obtain an injunction against one O'Donald from disposing of certain

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"funds and credits due" to the bankrupt and which were in the possession of the said O'Donald. Judge Lowell, of the Massachusetts District, basing his opinion upon the case of Bardes vs. Bank, refused to grant the injunction, and commenting on the cases of Bardes vs. Bank and White vs. Schloerb, closes his opinion with the following language:

> "It is greatly to be desired that a further exposition of the jurisdiction of the District Court in bankruptcy should be made as speedily as possible by the Supreme Court, and if counsel for the petitioners shall desire to take this case directly to the Supreme Court, as is provided by Section 5 of the Judiciary Act of 1891, 26 Stat., 827, I will gladly facilitate proceedings to that end."

And so it is that your petitioner contends that by reason of the decision in the case at bar, and the others so cited, there is a contrariety of opinion, and not a uniform administration of the Bankruptcy Act (as necessary as uniformity in the Act itself, required by Sec. 8, Sub-sec. 4, Art. 1 of the Constitution of the United States) as to the grave and important question, to-wit: The right of the court of bankruptcy to summarily order in property which is admittedly assets of a bankrupt's estate and which the holder thereof is not claiming as his own.

Your petitioner appends hereto his brief in support of this petition.

WHEREFORE, your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record in all proceedings in said Circuit Court of Appeals in the case therein, entitled "The Wayne Knitting Mills, Belding Brothers & Company and the German Insurance Bank, against E. B. Nugent, bankrupt, on petition of W. T. Nugent

for review, No. 920," to the end that said case may be reviewed and determined by this Court, as provided by law; and that the judgment of the said Circuit Court of Appeals in said case may be modified so as to deny the petition for review filed by said W. T. Nugent to that Court in bankruptcy.

And your petitioner will ever pray.

WILLIAM W. WATTS,
JOHN RICHARD WATTS,
Counsel for Petitioner.

STATE OF KENTUCKY, }
JEFFERSON COUNTY. } SCT.

William W. Watts, being duly sworn, says that he is one of the counsel for Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, bankrupt, the petitioner named; that he has read the foregoing petition, and the facts therein stated are true, as he believes.

WILLIAM W. WATTS.

Subscribed and sworn to before me this 29th day of January, A. D. 1901. My commission as Notary Public expires on the 12th day of January, A. D. 1904.

[SEAL]

E. B. KERR,
Notary Public within and for County of Jefferson, State of Kentucky.

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Supreme Court of the United States.

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT . . . *Petitioner*,

vs.

WILLIAM T. NUGENT . . . . . *Respondent.*

Brief for the Petitioner, Arthur E. Mueller, Trustee in Bankruptcy of Edward B. Nugent, Bankrupt, in Bankruptcy.

The gravity of the situation in which the bankruptcy law will be placed, if this case shall be affirmed, will indeed be very great.

The Circuit Court of Appeals for the Sixth Circuit, in the case at bar, has, in effect, announced that, however one is holding assets of a bankrupt's estate, coming to his hands before the proceedings in bankruptcy were begun, he must, if he does not voluntarily surrender them, if recovery be desired, be sued in an independent action, which means dilatory processes in another court.

As expressly decided, an agent or custodian of such property, without claim of ownership or adverse title thereto, must, if he does not surrender, be sued in a plenary suit, and is not subject to rule. An assignee under a deed of assignment for the benefit of creditors, it is expressly stated, must be sued in an independent action even though the deed be an act of bankruptcy and made void by the adjudication.

While all our criticism of the opinion is profoundly respectful, yet we believe this case is not within the principles

of the Bardes case. The opinion will result in and engender evil influences, multiplying opportunities to commit frauds upon the Bankruptcy Act and creditors. In order to obtain from the Act the highest degree of usefulness there is need for the very broadest construction, justified by the law, to be placed on the provisions thereof, ignoring rights of neither creditors or bankrupts.

The facts of the case are fully set forth in the petition for the writ, which is filed under Section 25*d* of the Act of 1898.

The pendency of an indictment as relied upon by him in his response (R., p. 23) did not excuse W. T. Nugent from disclosing the facts. That matter is soon disposed of.

> "A court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws, nor invading the constitutional right of trial by jury.
>
> . . . . . .
>
> "The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution.
>
> . . . . . .
>
> "And it is no defense to the civil action that the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction." *In re* Eugene Debs, etc., 158 U. S., 564.

That authority was relied upon, and the above excerpts quoted, in the case of Ripon Knitting Works vs. Schreiber, 101 Fed., 810, decided under the Act of 1898.

Therefore the case presents but two main questions:

First: The failure of the Circuit Court of Appeals to sustain petitioner's motions to expunge as impertinent, from the record before it, matter not before the referee or Judge below, nor acted upon by either, and yet which matter, we infer, was relied upon by said Court of Appeals in reaching its conclusion.

Second: Do the principles of the Bardes case, or those of

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White vs. Schloerb, both decided by this Court, apply to the one at bar? Did the agency of the respondent, without adverse claim or color of title to the fund, take it out of the Bardes case, leaving White vs. Schloerb to cover it, and thus leave to the District Court its jurisdiction to summarily order in the assets in *custodia legis?*

THE MOTIONS TO EXPUNGE.

We are complaining that the Circuit Court of Appeals did not sustain the motions made by us to expunge certain impertinent matter contained in and filed with the petition for review, and which though not a part of the record below, must have been relied upon by the Court of Appeals.

The motion will be found on page 10 of the printed record, and the most important item of all the impertinent matter is what is called Exhibit No. 11: "Amended response and copy of indictment." (R., p. 37-38.)

Our objections to a reading of that response are these:

First: It was never filed. It was never a part of the record, nor was it acted on by the referee or District Judge. It was not even made a part of the record for the purpose of appeal or review, as is the practice in equity when the motion to file is refused.

Second: The Court of Appeals could only consider it as an original pleading filed with it. This it has decided it can not do; that it can only revise those matters of law fairly presented to and acted on by the Judge of the District Court.

Cunningham vs. German Insurance Bank, 103 Fed., 932.

Courier-Journal J. P. Co. vs. Schaefer-Meyer Brewing Co., 101 Fed., 699.

Third: This Court meant something in its construction of the Act in its General Order 12 where, after providing for

a reference to the referee, it is said: "And thereafter all the proceedings, except such as are required by the Act or by these General Orders to be had before the judge, shall be had before the referee."

It meant something by the provisions of General Order 27, where, on review to the judge, it is provided that the referee shall certify the question presented, a summary of the evidence and his findings and order thereon.

It meant something by promulgating form 56 covering that certificate.

And though the Act in Section 1 provides that "court" may include the referee, the words of this Court, in the case of White vs. Schloerb, 178 U. S., 542, are even more significant, to-wit:

> "Under Sec. 33–43 of the Bankrupt Act of 1898, and the Twelfth General Order in Bankruptcy, referees in bankruptcy are appointed by the courts of bankruptcy, and take the same oath of office as judges of the United States Courts. Each case in bankruptcy is referred by the Court of Bankruptcy to a referee and he exercises much of the judicial authority of that Court."

The referee under the present Act decides contested matters before him. Under the Act of '67 the register could not do so.

If, then, upon a reference the referee is the Court, and if he exercises judicial functions, a review to the Judge is in the nature of an appeal; it is the referee's action that is reviewed; the review is heard on the record sent up by the referee, and that record must be made up before the referee, and is the record throughout the case.

The amended response was never even offered to be filed before the referee, and it was no more proper to offer it before the District Judge than before the Circuit Court of Appeals or before this Honorable Court.

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Fourth: Still insisting that the Judge could not receive the paper on review, it was at least within his judicial discretion to refuse to receive it when the case had been heard and determined by him.

The exercise of such discretion, at the stage of the case when the amendment was offered, will not be disturbed on appeal.

Neale vs. Neale, 9 Wall., 1.

Fifth: Since the salient feature of that paper (R., p. 38) is this: "He says that whatever money came to his hands on February 19, 1900, belonging to said E. B. Nugent, or any such money at any subsequent date thereafter, was not received or held by this respondent as agent or bailee or in any trust capacity whatever, but was held adversely to said E. B. Nugent," we contend that it was but a sham, a subterfuge, built to avoid the effect of the decision of the Court rendered two days before; and that even if the filing of an amended response was before the Judge, and at that stage of the proceedings, allowable, such a conclusion of law as was alleged, all the circumstances of the case considered, would not be accepted. Facts on which to base intelligent action should be stated.

> "A plea that at the time of the bringing of this suit and long prior thereto this defendant was and still is in the open, notorious, continuous and exclusive possession of the said premises, as the sole owner thereof, and claiming and holding adversely to the complainants and the whole world, is bad in that it consists of conclusions of law."
>
> McCloskey vs. Barr, 38 Fed., 165.

On the motion, out of time, to file a pleading against objection, the Court may look to the sufficiency of the pleading, in its determination of the motion to file.

Sixth: After the failure to amend the response before the

referee, it was proper for the Judge to refuse to allow the amendment to be filed, when Nugent had stood by his response, waited till after the hearing on review, and, after the case was decided by the Judge, then offered, with conclusions of law only, a demurrable amendment, which in general terms tried to avoid the effect of the opinion of the Judge, rendered two days before, in deciding the case.

It is not proper practice that a party shall wait to see what the Court will decide, on review or otherwise, before he puts in his defense.

What is said above applies as well to that paragraph in Nugent's petition for review to the Circuit Court of Appeals, quoted in the motion to expunge (R., p. 11), as follows:

> "He says that he had converted all of said money of E. B. Nugent which came into his hands to his own use, he being a creditor of said E. B. Nugent, and to the paying of the other debts of E. B. Nugent before the filing of said petition in bankruptcy or the appointment of said trustee or the adjudication therein, and that there was no evidence to the contrary, or that he had any of said money on hand or under his control when he was served herein as stated."

That matter is entirely new, appearing for the first time in the record in the Court of Appeals. It does not appear in the original response (R., p. 23) or the so-called amended response (R., p. 38.) It was not before either the referee or the Judge, nor was it acted upon by them, and is in direct conflict with their findings of fact.

The Court of Appeals is not a court of original jurisdiction, and issues are not to be joined there, or proof taken there on such issues.

Eliminating, then, these two objectionable features, the impertinent matter, and matter not before or acted upon by either Judge or referee, there is not in the case a scintilla of

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claim to either title or adverse possession. And will this Court allow such practice, such padding of the record on review, with matter *dehors* the record, put there to defeat the ends of justice and the provisions of the Act of Congress as to bankruptcy? We can not conceive it.

DOES THE BARDES CASE, OR WHITE VS. SCHLOERB, APPLY?

Both cases were decided on the 28th day of May, 1900, and are reported in 178 U. S., pp. 524 and 542 respectively. The one deals with him who holds assets of the estate in adverse possession coming to his hands before the bankruptcy proceedings. The other deals with him who seizes the assets after the bankruptcy proceedings had begun and when the property had come in *custodia legis*. This Nugent case is intermediary, and deals with one coming in possession three hours before the institution of bankruptcy proceedings, yet who holds the assets as agent only without adverse claim. Which of the cases decided by this Court applies—Bardes vs. Bank or White vs. Schloerb? Or does it devolve on this Court now to formulate other principles applying to and covering the case at bar?

The proposition raises the question whether a court of bankruptcy has power to gather in the assets of the bankrupt under Section 2 (6, 7, 13) of the Act of 1898 by summary process or rule, against one who may have the mere naked possession of the property as an agent or custodian of the bankrupt. No question of fact is involved, for the finding of fact by the referee, as a first court in bankruptcy, as reviewed by the Judge, is conclusive; and the bare question of law as to the method of obtaining possession of the bankrupt's estate is alone to be considered. The referee and District Judge decided that W. T. Nugent, a few hours before the petition

in involuntary bankruptcy was filed, came into possession as agent and custodian for the bankrupt of funds belonging to the bankrupt's estate · that up to and until after the hearing before the District Judge he still held possession of the said assets, making no claim or title thereto; and further decided that under such circumstances an independent suit need not be brought by the trustee; but that he could proceed by rule before the referee.

Upon a petition for review the Court of Appeals reversed this ruling and in fact decided that the remedy by rule was not allowable under the law. The latter Court even declared that though a person had made a general assignment, and, upon petition of creditors, on that ground had been adjudged a bankrupt and the title of the assignee thereby became void, nevertheless the trustee in bankruptcy would be compelled to resort to a plenary suit in order to recover from such assignee the assets in his hands.

In the case at bar W. T. Nugent, the son of the bankrupt, was his confidential clerk and agent, and acquired possession of the property in that capacity only, and both before and after the bankruptcy proceedings was holding it as such.

The finding of fact by the District Judge that an agency existed takes William T. Nugent out of the category of "third parties" "in adverse possession," holding under a fraudulent transfer, and he is an "other person," within the meaning of Section 2 (13) of the Act providing for the enforcement of obedience of lawful orders by bankrupts and other persons, and he, as such, is amenable to the same processes under the Act as the bankrupt himself.

The Court of Appeals, as we conceive, with all due respect, has misapplied the case of Bardes vs. The Bank, 178 U. S., page 524, in deciding that the District Court under the circumstances of this case has no jurisdiction to proceed by rule.

We submit that the Bardes case does not directly or re-

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motely decide that an agent of the bankrupt, holding as mere custodian, must be sued in an independent suit in order to compel him to surrender the bankrupt's estate. In the Bardes case this Court states the principal question involved in this language:

> "The present appeal from the final decree of the District Court dismissing the bill for want of jurisdiction, distinctly presents for the decision of this Court the question whether, under the Act of 1898, a District Court of the United States in which proceedings in bankruptcy have been commenced and are pending, under the Act has jurisdiction to entertain a suit by the trustee in bankruptcy against a person holding, and claiming as his own, property alleged to have been conveyed to him by the bankrupt in fraud of creditors."

It will be observed that this Court in this branch of that case undertook to decide whether suit might be maintained in the District Court against a person holding or claiming the property "*as his own*," which property was *alleged* to have been *conveyed to him by the bankrupt*, before the bankruptcy proceedings begun, in *fraud of creditors*.

In order to bring the case at bar within the ruling of the Bardes case, or to make it a parallel case, it is necessary that the case at bar should have been begun by an independent bill in equity in the District Court; and to have alleged that W. T. Nugent was holding the property and claiming it "as his own;" and that it had been conveyed to him by the bankrupt prior to the bankruptcy proceedings in fraud of his creditors. None of those conditions obtain here. The delivery to the agent or custodian as such, is not a parting with the title, nor a fraudulent transfer. The intention of the parties controls. (Ewing vs. Burnett, 11 Pet., 41.)

A differentiation is made between an agent holding assets of an estate without claim against the same, and one who is

holding property "as his own," though fraudulently transferred to him. In the one case the property is admittedly, at once, assets of the estate; in the other the property is not the assets of the estate, but must be made so. In the latter case, the transfer must be adjudged to be fraudulent, the title must be tried, perhaps the aid of a jury invoked, to have it then declared that the property shall be restored. Therefore, we submit that the Bardes case is not authority for the case at bar.

It will be observed, too, that this Court, further along in the opinion in the Bardes case, declared that it was decided under the Act of 1867 that a plenary suit was necessary in order to recover from a third party property conveyed to him before the bankruptcy proceedings if he was claiming adversely to the trustee (or assignee under the old law); so that throughout the entire case the question of whether the custodian holds as mere custodian, or holds adversely, is a vital one, in order to determine whether a plenary suit must be brought, or whether the Court may proceed by rule.

The Court of Appeals says:

> "But it is the exercise of jurisdiction to determine whether the circumstances are such that the possession is really in right of the bankrupt, or adverse to him or to the trustee."

It is not the "exercise of jurisdiction" simply to consider the preliminary question *in limine* as to whether or not there be jurisdiction. The first thing the Court must determine is the question whether it has jurisdiction. This is a mere preliminary inquiry. It is not taking jurisdiction of the action nor inquiring into the merits of the action. In the case at bar it was necessary for the referee, before whom the petition for a rule was filed, to inquire into that preliminary question, and in doing so he was compelled to ascer-

tain whether the respondent was claiming the property adversely or whether he held it as a mere custodian. Upon the settlement of this question depended the jurisdiction.

But we submit that the case at bar must not be tried by the test laid down in the above quotation from the Court of Appeals, for, because of respondent's failure to assert adverse possession, the referee was not called on "to determine whether the circumstances are such that the possession is really in right of the bankrupt or adverse to him or to the trustee."

That question, for this Court, was eliminated in two ways:

First: The respondent asserted no right or title to the property before the referee.

Second: The question of circumstances under which he held possession was conclusively found by the referee, and by the Judge, with respondent failing to assert ownership or adverse claim; and the question of fact is not a question to be considered by the Court of Appeals on petition for review, as it would be had appeal been allowed and taken under Section 25 of the Act. Only questions of law can be considered on review and the Act has been so construed by the Court of Appeals in the Sixth Circuit in the case of Cunningham vs. German Insurance Bank, 103 Fed., 932, and Courier-Journal Job Printing Co. vs. Schaefer-Meyer Brewing Company, 101 Fed., 699.

Again it was decided *in re* Rosser, 101 Fed., 652, by the Circuit Court of Appeals for the Eighth Circuit, that—

> "The effect of an adjudication in bankruptcy is to place all the property of the bankrupt, not exempt by law, in the custody of the District Court, and to charge the bankrupt and all other persons who have the possession or control of any of it, as trustee for the Court and for the trustee in bankruptcy who is subsequently appointed."

The same is held in the opinion of Judge Jackson *in re* Moore, 104 Fed., 869, quoted below.

The opinion of the Court of Appeals further says: "Let it be conceded that in the eye of the law the possession of the agent is that of the principal," etc. As we conceive it, this admission is inconsistent with the conclusion of the Court; for if W. T. Nugent was holding this property as the agent of the bankrupt, and if the bankrupt's estate is placed in *custodia legis* by the adjudication in bankruptcy, the agent must hold as trustee of the Court and its officer; and it follows that the Court certainly has the power to compel its agents or trustees to return to it or to its trustee in bankruptcy all property thus held. Moreover, it seems to us that that ruling would logically require the trustee to go into an independent suit to recover property in the pocket of the bankrupt himself (the contrary being held *in re* Purvine, 96 Fed., 192) if it requires him to adopt such a proceeding to recover possession from the bankrupt's custodian, for the possession of the agent is the possession of the principal.

If a suit were brought against the assignee under a general assignment, where bankruptcy had followed by reason of such assignment, the assignee in an independent suit would not be heard to dispute the title of the trustee in bankruptcy, because his title is already determined by the adjudication itself. He could only plead that he has possession under the assignment, and upon the filing of such a plea judgment by confession would follow. To require suit to be brought under these circumstances strikes us as making it necessary for the Court to submit to being trifled with, with possibly years of delay on appeal. Of course if the custodian, in good faith, was asserting any claim or colorable claim to the property a rule against him to deliver possession would have to be discharged at once, under the principles of the Bardes case; but in order to ascertain whether he was making such a claim a rule to show cause ought to be eminently proper.

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A court in bankruptcy, upon adjudication, coming into control of the *res*, surely has the power to inquire by rule, of one alleged to be an agent, why he shall not deliver over to the trustee in bankruptcy the property in the hands of such agent. The Court has the right to make its diagnosis, to have a proper statement of fact in response, showing whether such adverse holding exists; and if it exists, on such showing it must, under the Bardes case, discharge the rule. Otherwise, if such claim or facts are not made or shown.

Such a proceeding does not involve the title of the respondent, but merely shows to the Court, as it is entitled to know, whether an adverse claim exists; whether the property is assets of the estate; or whether there must be a separate and independent suit to determine that proposition. The rule is only what the respondent chooses to make it. If he shows adverse claim, color of title, title or ownership, there is nothing to do but let him go; and then the trustee may bring a plenary suit. But if the respondent shows nothing, except that he questions the jurisdiction of the Court to issue the rule, that jurisdiction is complete and the order to turn over ought to go.

Such a construction of the law as the Court of Appeals has given would lead to many useless suits, incurring thousands of dollars of expense without accomplishing any good results, and would entail great and unnecessary delay in the gathering in of the bankrupt's estate. In places where the State courts meet twice a year in many instances at least six months would be lost.

The evils of such a rule are clearly stated by Judge Jackson, of the West Virginia District, in the case of *in re* Moore, 104 Fed., 869, and the facts and reasoning are so in consonance with our ideas of the case at bar, the opinion being short, we take the liberty of quoting it in full:

> "The certificate of the referee, and the report of the trustee of the above bankrupt, which have been certified

to the District Judge, show that the bankrupt, just prior to the filing of the petition herein, turned over to his wife certain moneys and properties amounting to $300 in value, which properties she now refuses to turn over to the trustee, although admitting the receipt. The wife of said bankrupt has made no claim of ownership of said property, but simply claims, according to the record now before me, that she is advised by her counsel not to deliver possession thereof to said trustee unless ordered by Court. While title to property or moneys claimed by the trustee to belong to the bankrupt are not ordinarily to be tried by the District Court, and the claims of ownership of adverse claimants summarily be passed upon and determined by this Court, yet, the ownership not being contested, the trustee should not be driven to his action to obtain possession of property of the bankrupt, simply because such property is in the possession or custody of another now claiming ownership thereof. Were this the case, the trustee might be compelled to institute suit for every separate item of the bankrupt's estate not in the personal, physical possession of the bankrupt at the date of the adjudication; and the malice, caprice or whim of the bankrupt, or the various parties who chanced to have physical control of portions of the bankrupt's estate at that date, could, on any pretext, or without pretext, nullify the entire purpose of the Act. Fortunately the Bankruptcy Act is not subject to such an absurdity. As soon as the trustee is appointed and qualified he is vested with the title to the bankrupt's property. The vesting of the title gives him constructive possession of the property the instant the title passes. Such property is thereby brought into the bankruptcy court and placed in its custody and under its protection as fully as if in the visible presence of the Court. Being in the custody of the bankruptcy court, to interfere with or withhold it is contempt of such court, and may be punishable as such. Section 21*e* provides that a certified copy of the order approving the bond of the trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and is sufficient to authorize and require all custodians of such property, wherever situated, to deliver it to

such trustee. Section 70, Subd. 5, provides that the trustee shall be vested by operation of law with the title of the bankrupt to 'all property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him.' Upon the facts of this case an order should be entered requiring Mrs. Moore to forthwith turn over to the trustee all property of the bankrupt of every description in her possession, and a failure to comply therewith would, upon proper proceedings had thereon, constitute a contempt of this Court."

The practice under the present law of taking the assets from the custodian by rule has been followed in several instances. *In re* Brooks, 91 Fed., 508, Judge Wheeler, by a rule compelled a purchaser, under purchase made after the filing of the petition in bankruptcy, to turn over the property to the trustee, even though the sheriff, who made the sale, had already levied upon the property prior to the proceedings in bankruptcy.

In White vs. Schloerb, 178 U. S., 542, this Court sustained the action of the lower Court in compelling, by summary process, the return of the bankrupt's goods, taken by a sheriff in replevin after the filing of bankruptcy proceedings, and this language is found in the opinion :

"The questions certified concern not the trial of the title to these goods, but only the judicial custody and lawful possession of them."

Thus it is shown that this Court intended to draw a distinction between an effort to try the title by rule and simply depriving one of possession who claims no title.

The facts in the case at bar show that the agency of W. T. Nugent was amicable and continuous, both before and long after the filing of the petition in bankruptcy ; and his con-

tention that he was an adverse holder never was made, or attempted to be made, until after the decision of the District Judge on review from the referee, and after the property came in *custodia legis*. Actual possession of the *res* is not necessary to put the property in *custodia legis*. (Adams vs. Mercantile Trust Co., 66 Fed., 617.) It was after the decision of the District Judge that respondent for the first time tried to assume the attitude of an adverse claimant; but in so doing he put himself in exactly the attitude of the sheriff in White vs. Schloerb, who sought to take the property after it came in *custodia legis*.

In re Raymond W. Kenney, 95 Fed., 427, Judge Brown of the Southern District of New York compelled a sheriff, who had collected monies on execution against the bankrupt before the proceedings in bankruptcy were filed, to deliver the same to the trustee.

In re Francis-Valentine Company the Circuit Court of Appeals for the Ninth Circuit held just the contrary to the ruling of the Circuit Court of Appeals in the Sixth Circuit in this case, and expressly declared that the District Court has jurisdiction, by summary proceedings, to compel a sheriff, who has possession of the property levied upon within four months before the institution of the bankruptcy proceedings, to surrender the same upon petition by the trustee.

So that we have one rule prevailing in the Ninth Circuit, the Southern District of New York, the District of Vermont and the District of West Virginia, and a contrary rule prevailing in this, the Sixth Circuit. Judge Gilbert, who rendered the opinion in the Ninth Circuit Court of Appeals, comments on the case of Marshall vs. Knox, 16 Wall., 551, which seemed to be opposed to his view, by showing that this Court in Marshall vs. Knox denied the right to proceed by summary process because "the landlord claimed the right thus to hold possession until his rent was satisfied. This claim was adverse to that of the assignee."

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W. T. Nugent in fact claimed no adverse title and it was so found upon the hearing before the referee, as well as by the District Judge. His possession is shown to be that of agent, in amicable possession, for three hours before and until long after the filing of the petition in involuntary bankruptcy. The filing of such a petition is a caveat to all the world, and is in effect an attachment and injunction. (Bank vs. Sherman, 101 U. S., 406.) His amended response, even had it been in time, even had it been offered before the referee, and before the case was decided by the District Judge, is not a proper response in any legal sense, for it is clearly demurrable and bad. To say that he did not have in his hands any amount of money which he held as agent or bailee; or that the same did not come to his hands as agent or bailee; or in any trust capacity; or that he held the fund adversely to the bankrupt, is pleading a conclusion of law. To make such pleading available he should have given the facts so that the Court could have determined whether or not he was holding as agent or trustee. For instance, he might have pleaded as did the landlord in Marshall vs Knox, *supra;* or that his father, the bankrupt, was indebted to him for salary, and that such funds were paid to him in satisfaction of such claim; or that he had paid out money for his father and received this fund in reimbursement for such payment; or that he had expended this actual money for his father's benefit, showing the details; and he should not have offered only conclusions of law as a response.

It seems to us that such an indefinite pleading, offered out of time, and after the decision in the case, attempting to contradict the previous findings of the referee and Judge, is not worthy of consideration; and that the Court ought not to allow such a response to be filed. In fact, though the referee would have been compelled to halt and discharge the rule, upon its appearing that W. T. Nugent had a *bona fide* claim to the funds in his possession, nevertheless, had

such response as was offered been made before him in the beginning, he would have been compelled to hold the same insufficient, because it left to W. T. Nugent and not to the referee the right to determine whether or not he was setting up a colorable claim. Surely a party who is ruled can not be given the right to determine by pleading mere conclusions of law whether or not there be jurisdiction to proceed against him. He must assert a sufficient claim, and when it is sufficient on its face then and then only, can the District Court be compelled to halt with its rule; but the Court, not the respondent, must determine the jurisdictional question.

On the whole we believe the construction given to "adverse possession" by the Court of Appeals is not only new but startling, and can not be sustained by any authority; that the motions to expunge should have been sustained, and that the principles of White vs. Schloerb, not those of the Bardes case, apply. A study of the Bardes case, sentence by sentence, line by line, word by word, reveals the idea and conclusion, that the doctrine, that it is a third party holding in adverse possession against the bankrupt, under a transfer alleged to be in fraud of creditors, runs through the whole opinion and permeates and colors every statement in it. No such elements exist or can be found in the case at bar.

As was said by Judge Wheeler *in re* Lewin, 103 Fed., 851 commenting on Bardes vs. Banks:

> "This is not a suit such as is mentioned in that clause of Section 23, but is an administrative proceeding of which the bankruptcy court has express jurisdiction." . . . .

Hence we ask that the writ, as prayed for, be granted.

Respectfully submitted,

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